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Supreme Court of the United States

October Term, 1966

No. 352

BETTY LEVIN, a holder of Missouri Pacific Railroad Company Class B common stock,

Petitioner,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF BETTY LEVIN, PETITIONER

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The National Public Interest Warrants Review by This Court

Fundamental to the decision of the Court of Appeals is its construction of § 5(11) of the Interstate Commerce Act.

The court construed § 5(11) to provide that, for mergers and consolidations under the Act, the stockholder vote "required under applicable State law" is only the vote expressly set forth in a state statute, and not a different vote required by charter provisions which are valid under state law. (Levin Pet. 34a, 35a-36a; 359 F. 2d at 119, 120) This construction of § 5(11) renders completely inoperative, for mergers and consolidations under the Act, all charter provisions for stockholder voting, even though such charter provisions are (as in Missouri) expressly authorized and

made controlling by state statutes governing mergers and consolidations.

The immediate consequence will be to deprive the public and the ICC of a tool that has long proved invaluable in formulating and implementing railroad reorganizations. If the decision stands, such charter provisions for stockholder voting can no longer be utilized in the difficult process of arriving at plans of railroad reorganization that meet with the consent of the parties entitled to vote thereon and that in addition satisfy the overriding requirements of § 77 of the Bankruptcy Act that reorganizations be "fair and equitable" and "compatible with the public interest".

Furthermore, the Court of Appeals' interpretation of § 5(11) completely undermines what the ICC, the federal courts, and the parties to numerous railroad reorganizations achieved in making such charter provisions an integral part of their plans of reorganization now in effect. Many such plans stipulated charter provisions requiring a stockholder vote different from the vote that would be required by state statute in the absence of such charter provisions.*

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* See, *e.g.*, MoPac charter (Levin Pet. 6-8, 14) and the charter of the Chicago & Eastern Illinois Railway (230 ICC 199, 571). The C & EI charter provides, as does the MoPac charter, for class voting although the state statute provides for collective voting in the absence of a different vote stipulated in the charter. The C & EI charter provisions for class voting have been expressly recognized—by the parties, the ICC, and a three-judge district court in the Seventh Circuit—as being applicable to railroad mergers and consolidations. *Illinois Central Railroad Co., et al.* v. *United States, et al.*, — F. Supp. — (N. D. Ill. 1966), No. 65 C 1393, pp. 4, 19-20, affirming the ICC decision in the C & EI proceedings described at Levin Pet. 34 n. 34.

MoPac devotes 6 pages (15-20) to arguments on the merits, without citing a single authority and without advising this Court

Such a decision by the Court of Appeals, so jeopardizing the workability of important federal statutes designed to promote the national public interest, clearly warrants full review by this Court.

Respectfully submitted,

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that there are a number of court and ICC decisions in point, and all to the contrary:

(1) The following authorities support the District Court's construction of § 5(11) of the Interstate Commerce Act:

Louisville & J. B. & R. Co. Merger, F. D. 18656, ICC Order March 7, 1962 (unreported) (see Levin Pet. 30-31);

Illinois Central Railroad Co., et al. v. *United States, et al.*, — F. Supp. — (N. D. Ill. 1966), No. 65 C 1393, pp. 4, 19-20, affirming *Missouri Pac. R. Co.—Control—Chicago & Eastern Illinois R. Co.*, — ICC — (1965), F. D. 21755 (see Levin Pet. 34 n. 34);

Sellers v. *Joseph Bancroft Sons & Co.*, 23 Del. Ch. 13, 24, 2 A. 2d 108, 113 (1938);

49 C. F. R. § 52.3.

(2) The following authorities support the District Court's conclusion that the MoPac charter provisions for class voting are au-

thorized and made controlling by the Missouri statutes of Chapter 351 applicable to stockholder voting on mergers and consolidations:

Louisville & J. B. & R. Co. Merger, supra;

Illinois Central Railroad Co., et al. v. *United States, et al., supra.*

Standard Power & Light Corp. v. *Investment Associates Inc.*, 29 Del. Ch. 593, 51 A. 2d 572 (1947);

Haller, *Corporate Control under the Illinois Business Corporation Act through Charter and By-Law Provisions*, 32 Chicago Bar Rec. 411, 413 (1951);

Missouri Business Enterprises, Practice Handbook No. 6, Missouri Bar Continuing Legal Education Committee (1962), § 8.14, p. 217, Article III(b)8;

Opinion of Attorney General, December 14, 1948, Annual Report of Attorney General of New York (1948), p. 229.

(3) The following supports the District Court's conclusion that the MoPac charter requires class voting for any matter (such as the plan of consolidation in issue) that would alter or change class rights:

Louisville & J. B. & R. Co. Merger, supra.

The present opposite contention of MoPac and Mississippi—that MoPac's Article VII D(3)(c) does *not* apply to mergers consolidations because it does not specify them (MoPac 16; Miss. 11)—would totally nullify that Article, which does not specify any other device either. Instead, it covers all possible devices and transactions that might alter or change class rights—mergers, consolidations, recapitalizations, charter amendments, etc.—simply by prohibiting any alteration or change of class rights, unless approved by a separate class vote.

Where the Articles *do* specify merger and consolidation, it is to *exclude* them from the application of the Article in question (Article VII D(2); this was necessary to avoid claims, such as had been made in *Schwabacher* v. *United States*, 334 U. S. 182 (1948), that a merger or consolidation is tantamount to a liquidation, dissolution or winding-up so as to confer the same rights on stockholders under state laws).

As for MoPac's assertion in this Court that the right to a class vote under MoPac's charter turns on distinctions between a merger and a consolidation, and on which corporation survives the transaction (MoPac 15, 24 n. 30), it is here sufficient to note that both MoPac and Mississippi explicitly rejected such inapposite distinctions in the Court of Appeals (see their briefs in that court: MoPac 15; Miss. 29-30).